TIDE-FLOWED LANDS AND RIPARIAN RIGHTS IN THE UNITED STATES.

THE United States Supreme Court has frequently called attention to the fact that titles to the shore and shore rights are matters of local state law in which the court must follow the local decisions, and some of the best considered cases in the several state courts also refer to their own law as different from that of other states.[1] But nevertheless it does not seem to be generally understood that there are two well defined theories of riparian rights and the state's title to tide-flowed lands in this country, and much less that these two theories have distinctive historical origins.

The first of these is frequently referred to in the reports of the United States Supreme Court and other cases as the common law of the United States upon these subjects. It is best and most fully exemplified in the law of Connecticut, where the riparian owner has had the exclusive right to wharf and fill out in front of his upland since early colonial days, and it is referred to as having grown up by custom.[2] This exclusive right grows out of the location of the upland which furnishes the only right of access to the shore. But the right of access is not a mere technical access, as we shall see it is in New York, nor is it limited to an access to a technical "channel" at low-water mark, as apparently in Massachusetts, but it is the substantial and useful right to reach the deep channel used in practical navigation.[3] In common with all modern cases, the Connecticut court holds that the technical fee below high-water mark is in the state, and the right of the riparian owner is therefore stated to be in the nature of a franchise. But whatever may be its proper definition, this riparian right is a

[1] See Shively *v.* Bowlby, 152 U. S. 1, 26, 57; Sage *v.* New York, 154 N. Y. 61, 78; Gould *v.* Hudson River R. Co., 6 N. Y. 522, 539; Boston *v.* Richardson, 105 Mass. at p. 361.

[2] Swift's System 341–342 (1795). In East Haven *v.* Hemingway, 7 Conn. at p. 203, the court say: "It stands on the same ground of general usage which is at the foundation of the Common Law."

[3] Prior *v.* Swartz, 62 Conn. 132. In Illinois Cent. R. Co. *v.* People of Illinois, 146 U. S. at pp. 449–450 the Supreme Court also placed the limit of the riparian owner's right at practical navigability. See also same case on further appeal, 184 U. S. 77.

valuable right of property of which the owner cannot be deprived without compensation,[1] and early became so nearly a title to tide-flowed flats that the owner could convey them separately from his upland. Finally, the title of the state is so technical, and held so fully for the common public benefit, that the establishment of harbor lines "is only the exercise of the police or supervisory power vested in the legislature, — the power to enact such laws as they deem reasonable and necessary for the regulation of the use by riparian proprietors of their qualified right in the soil of the shore,"[2] and in Prior *v.* Swartz it was held that the owner of a wharf could dredge a channel in front of it to navigable water, although he thereby destroyed oyster beds planted under authority of the state.[3]

The second theory is most readily stated from the law of New York. There the state owns the soil below high-water mark in such a sense that it can be granted away at pleasure to either the upland owner or to any stranger, and if an owner of the upland builds a wharf without a special grant of the soil from the state, it is subject to the rightful power of the state to destroy it or its value without making compensation. For many years after the case of Gould *v.* Hudson River Co.,[4] decided in 1852, it was supposed that the title of the state was unqualified and that the riparian owner had absolutely no rights, not even that of access to tide-water. More recent cases have slightly modified this view, and established the principle that the state holds its title in trust for the promotion and protection of commerce and navigation,

---

[1] Farist Steel Co. *v.* Bridgeport, 60 Conn. 278.

Accord: Yates *v.* Milwaukee, 10 Wall. (U. S.) 497, 503–504; Chapman *v.* Oshkosh, etc., R. R., 33 Wis. 629, 636–638 (River); Delaplacine *v.* Chicago, etc., R. R., 42 Wis. 214, 226–233 (Lake); Priewe *v.* Wisconsin, etc., Society, 93 Wis. 534, 549–552; Brisbine *v.* St. Paul, etc., R. R., 23 Minn. 114, 129–130; Carli *v.* Stillwater, etc., Ry. Co., 28 Minn. 373, 380; Union Depot Co. *v.* Brunswick, 31 Minn. 297, 300–303; Myers *v.* City of St. Louis, 82 Mo. 367, 378.

See also Mr. Justice Potter in Steam-Engine Co. *v.* Steam Ship Co., 12 R. I. at p. 367.

[2] State *v.* Sargent, 45 Conn. 358. The Connecticut view that harbor lines are an exercise of the police power for the preservation of navigation is also held by the Supreme Court of the United States in Illinois Cent. R. Co. *v.* People of Illinois, 146 U. S. at p. 459.

[3] In accord with the law of Connecticut are: Clement *v.* Burns, 43 N. H. 609; Concord Co. *v.* Robertson, 66 N. H. 1; Hanford *v.* St. Paul Ry. Co., 43 Min. 104; Norfolk City *v.* Cooke, 27 Gratt. (Va.) 438; Gough *v.* Bell, 22 N. J. Law 441, and Arnold *v.* Mundy, 6 N. J. Law 1.

[4] 6 N. Y. 522.

and, of course, its grantees can take no better title than it has itself. Within the trust, however, the title of the state is still so superior to any rights of the riparian owner that the latter may be deprived of all riparian rights, including his right of access to tide-water, without compensation, provided the state and its grantee do so by improvements for the benefit of commerce. But if an improvement is for any other purpose, although a public one, the riparian owner is entitled to compensation. As it now stands, however, it is strongly intimated that even in this case he can collect only nominal damages, because the only access to which he is entitled is by such boats as could reach his land at high-water mark, in place of the very substantial damages given by modern English authorities in similar cases.[1]

The law of New Jersey as now established and that of Massachusetts are the same as New York, except that in both the title is an absolute commercial title subject to no trust for the public, and except that in Massachusetts by force of the colonial ordinance of 1647 the state's title stops at low-water mark or the 100-rod line from high-water mark. This ordinance gave the riparian owners a title between high and low-water marks, but the title was later held, in Commonwealth *v.* Alger,[2] to be subject to the police power of the state for the benefit of navigation to lay a harbor line between high and low water and thereby limit the use of the shore by such owner. The title of the riparian owner in Massachusetts between high and low water is, therefore, now in substance the same as that of a riparian owner in Connecticut.

It would seem that the mere statement of the two theories would show that they were necessarily antagonistic,— that there could not be a right of property in the owner of the upland of which he could not be deprived without compensation, and at the same time such a title in the state that the privilege of the upland owner to

---

[1] The following cases sufficiently trace and explain the law of New York: Lansing *v.* Smith, 4 Wend. (N. Y.) 9; People *v.* N. Y. & S. I. F. Co., 68 N. Y. 71; Sage *v.* New York, 154 N. Y. 61; The Matter of the City of New York, 168 N. Y. 134; s. c. *sub nom.* Matter of Boos, 56 L. R. A. 500.

For English cases giving substantial damages for loss of access, see Duke of Buccleugh *v.* Metropolitan Board, L. R. 5 H. L. 418; Atty.-General *v.* Wemys, 13 App. Cas. 192; North Shore Ry. Co. *v.* Prior, 14 App. Cas. 612.

[2] The three Pacific coast states and probably some others have also adopted the law of New York. Eisenbach *v.* Hatfield, 2 Wash. 234; Bowlby *v.* Shively, 22 Or. 410.

See the legislation referred to in People *v.* Williams, 64 Cal. 498, and in Webber *v.* Commissioners, 18 Wall. (U. S.) 57.

wharf out is a mere revocable license. But very naturally in those states holding to the Connecticut theory the cases usually arise between private parties, while in those following New York the controversy is commonly between the state or its grantee on the one hand and the owner of the upland on the other. Hence it is not always perceived that the cases in the two sets of states are not different phases of one law common to both, and the courts of New Jersey have actually adopted the view that their earlier cases decided between private parties were not inconsistent with a commercially salable title by the state when the latter was ready to assert it. A comparison of the dissenting and majority opinions, in the two cases of Martin *v.* Waddell [1] and Illinois Central R. R. Co. *v.* People of Illinois [2] will also fully demonstrate that the theories are irreconcilable.

It will be seen however that the two theories agree in one point, that the incidents of the enjoyment of the soil below high water is in its nature private property. No one denies that the state as the conservator of public interests may control, improve, and regulate the use of navigable waters for the benefit of the people at large, — in other words, that the state has the *jus publicum* of Lord Hale and other writers. But the question whether the state in addition to its interest for the people at large has retained or can now seize upon property in the shore which necessarily has from its location the incidents of private commercial property, and make a profit for itself from its sale, is a very different matter. How do there happen to be these two theories in the United States? The contention that the state has a title to land under tide-water which it may sell and convey depends historically upon the theory that the *jus privatum* or private property in the soil was *prima facie* in the crown, and not in the owner of the upland. In 1849 Sergeant Mereweather, in his argument in Dickens *v.* Shaw,[3] said in speaking of this theory: "Up to the period when the Stuarts succeeded to the throne, there is not the slightest pretense or shadow of a case — document or record — to show that any such prerogative existed."

If it is true or substantially true that the *prima facie* title was a new theory at the time of the founding of our American colonies, it is certainly a fact which should be fully considered in determining what is the American law upon this subject.

---

[1] 16 Pet. (U. S.) 367. [2] 14 U. S. 387.

[3] Published in Hall on the Seashore, Append. p. cvi.

Sergeant Mereweather adduced many grants and cases to sustain his position that the theory was comparatively a modern one, and following him there was a considerable controversy upon the subject. On this side of the Atlantic we must necessarily depend upon English investigators and their published works, and among these none is more valuable than Stuart A. Moore's History and Law of the Foreshore and Sea Shore, — valuable not so much for his conclusions, although they are of great importance, as for the very large number of facts given by him bearing upon his subject. His work is generally accessible, and space permits only the briefest reference to a few of the more important facts for our purpose. Mr. Moore shows that by the end of the reign of King John substantially all the sea-coast of England had been granted in manors, and that in very few instances was there any express mention of the shore. But, on the other hand, he says, "no case has been found and no case can be found, in which it is shown that in any ancient grant the crown has specifically or impliedly reserved the *jus privatum* in the shore."[1] The taking of wreck in itself was not an incident of title, but a royal franchise which was the subject of special grant. There were, however, many grants of the right to take wreck within the lands of the grantee, and Lord Hale, the mainstay of the *prima facie* theory, justly refers to these grants of wreck *infra manerium* as strong presumptive evidence that where they occur the title to the shore was in their owner as his private property.

The times of Edward I. and Edward III. were the times of the wars in France, which unquestionably required large funds for their prosecution. Mr. Moore has given a full account of the minute inquisitions in these reigns in the attempts to discover encroachments upon the royal prerogative and property and thereby increase the royal revenues. These inquisitions were certainly well adapted to discover property rights of the crown, but although the Hundred Rolls, many of which are now accessible, show many presentments for illegally taking wreck, and encroachments upon the public rights of the crown, yet "not a single instance occurs in which it is suggested that the king had then an interest of property in the foreshore outside of the royal manors, although he has an interest of jurisdiction over the whole foreshore."[2]

The account of the origin of the *prima facie* theory is extremely

---

[1] Pp. 27–28.

[2] Moore 45.

interesting. The confiscation of church and college lands by Henry VIII. and Edward VI. led to the concealment of many titles, and these concealments gave rise to the "title hunters," who, discovering or pretending to discover concealed titles, obtained from the crown grants of such lands, which became known as "fishing grants." They then could sue in the courts or compromise with those in possession. It was one of these title hunters, Thomas Digges, who, wishing to obtain possession of certain marsh land which had been originally below high-water mark, first invented the *prima facie* theory, publishing it in a pamphlet in the reign of Elizabeth, A. D. 1568–9. During the remainder of this reign and the reign of James I. these "fishing grants" became an intolerable burden, and Mr. Moore says comprehended at least one half the land of England.

We now reach chronologically three or four facts of great importance in determining the common law which was brought here by the American colonists, — important because they occurred at the time of the early founding of this country. The first of these is the first statute of limitations,[1] with the title "An Act for the General Quiet of the Subject against all Pretenses of Concealment Whatsoever," and which forbade *inter alia* the crown or its grantees from disturbing any possession which had existed for sixty years or more. After the accession of Charles I., however, the crown promptly asserted that the shores and lands previously flowed by the tide were not within the scope of this statute, and about 1630 there began the litigation over the Wapping Wall in London. This finally developed into the case of Attorney-General *v.* Philpott, which is a second fact important for our purpose. The same court which Charles had packed to obtain his famous judgment in the shipmoney case, having refused a trial by jury, decided in favor of the crown's rights, and possession was obtained of a few houses upon the banks of the Thames. Then followed suits of ejectment in the Common Pleas brought by the lessors of those dispossessed against the new tenants, and jury after jury, Mr. Moore tells us, decided against the crown and its tenants until those tenants became the laughing stock of London. This litigation was still proceeding when the more important events of the Long Parliament and the rebellion of 1642 caused it to be forgotten and left the former owners in possession.

---

[1] 21 James I. c. 2.

Such is one of the two or three cases cited as authority for the *prima facie* theory by Lord Hale. Another is the Prior of Tynemouth's case in the time of the Edwards, which Mr. Moore says involved the right of the Prior to establish a new port, but which admitted the soil of the shore to be in him. Lord Hale's statement of the decision goes far to sustain Mr. Moore, for instead of stating it as full authority he says, "Afterwards judgment was given against the prior, but not in express terms for the soil, but implicitly."[1]

That Long Parliament, to which Macaulay says every lover of constitutional government throughout the English world owes deep gratitude, was nearly a year old when such leaders of the House of Commons as Pym, Hampden, and Cromwell began to formulate for presentation to the king and nation "A Declaration and Remonstrance of the State of the Kingdom." It is in the debate over this Grand Remonstrance that the two great parties which have ever since contended for the English government found their birth, with the three leaders already named on one side, and Edward Hyde, afterwards Lord Clarendon and father-in-law of James II., as one of those on the other. The Grand Remonstrance contains over two hundred paragraphs specifying illegal acts and usurpations by the crown, and its twenty-sixth article charges the king with "*the taking away of men's right under colour of the king's title to land between high and low water mark.*"

The debate over the Grand Remonstrance extended through many days, and the majority for Pym and his friends was not large. Upon the restoration and for long after, under the leadership of Clarendon's history, it was the fashion to belittle all acts of the Long Parliament and of the Commonwealth. But followed as it was almost immediately by the outbreak of open hostilities between Charles and the parliamentary forces, later generations, and especially we on this side of the Atlantic the settlement of whose country is so largely due to the oppressive government of the English crown at the time of which we are speaking, should realize that the recital of usurpations contained in the Grand Remonstrance are by direct inference declarations of what were then considered to be the common law. When, therefore, it is declared that the crown has taken away men's rights under color of title to the shore, there is no room left to question what was

[1] De Jure Maris, Chap. IV.

then considered to be the law upon this subject by all except the partisan adherents of the crown.

The fourth fact of importance is the case of Johnson *v.* Barret[1] decided in 1646. In the ten years which had elapsed since the decision of Attorney-General *v.* Philpott a complete transformation of the courts had occurred, and the pliant and corrupt tools of the crown had given way to the honest judges of the Commonwealth. Johnson *v.* Barret came before the Court of King's Bench of which Rolle was the head, and Lord Hale, then at the bar, was one of the counsel. The case will bear repeating in full:

"In an action of Trespass for carrying away the soil and timber &c Upon Trial at the Bar the Question arose upon a key that was erected in Yarmouth, and destroyed by the Bailiffs and Burgesses of the Town; and Rolle said that if it were erected between high Water mark and low Water mark then it belonged to him that had the Land adjoining. But Hale did earnestly affirm the contrary; viz that it belonged to the King of common right; But it was clearly agreed, that if it were erected beneath the low Water mark, then it belonged to the King. It was likewise agreed, that an Intruder upon the King's possession might have an Action of Trespass against a Stranger; but he could not make a lease, whereupon the lessee might maintain an *ejectione firmae.*"

The decision is not given in the report, but it is understood to have been in the plaintiff's favor. It would be idle to contend at the present day with large vessels of deep draft and with navigation of waters where there are no tides, as in our great lakes, that there is any difference between the shore above low water and the soil below. The important matter is to reach practical navigation, and no American state, so far as we are aware, has made any such distinction. In fact, Lord Hale makes no such distinction in his treatises.

No one without a strong predilection to the *prima facie* theory can read Lord Hale's treatises, we think, without being struck with the paucity of authority cited to sustain that theory, and the frankness with which he states that the shore and soil under water may be private property, as well as the large number of instances given in which they were actually so held in his own day. It was long ago pointed out by Judge Kirkpatrick in Arnold *v.* Mundy[2] that he cites, to his all-important proposition that title to the shore may be derived by grant from the crown, five such grants, all be-

[1] Aleyn 10.

[2] 6 N. J. Law at p. 75.

fore Magna Charta, namely, one by Knute, one by Edward the Confessor, two by William I. and one by John. The industry which could discover these ancient grants was not sufficient to find a single one during the four centuries intervening between Magna Charta and his own time.[1] An unprejudiced examination of his treatises will show that the *prima facie* theory was, in fact as well as name, a mere theory at the time Lord Hale wrote, and that the entire shores of England were in fact held in private ownership, as well as the rights and franchises of the ports.[2] In the few

---

[1] It is frequently said, especially in American cases, that Magna Charta prevented any such grants. See for example Martin *v.* Waddell, 16 Pet. (U. S.) at pp. 412–413, Clement *v.* Burns, 43 N. H. at p. 616. There is much force in this view, but it seems to be based upon the "equity" of the statute and the absence of later grants rather than upon its express terms.

[2] Thus in Chap. V. of the *De Jure Maris* he cites a number of instances of the right of fishery in front of the upland introducing them with the statement: "Now for precedents touching such rights of fishery in the sea and arms and creeks thereof belonging by usage to subjects, the most whereof will appear to be by reason of the propriety of the water and soil wherein the fishery is, and some of them even within the ports of the sea." He then refers to numerous statutes prohibiting the erection of waeres in navigable rivers, etc., and calls attention to the fact that these statutes excepted waeres on the sea-coast, and says:

"The exception of waeres upon the sea coast, and likewise frequent examples, some whereof are before mentioned, make it appear that there might be such private interests not only in point of liberty, but in point of propriety on the sea coast and below the low water mark; for such were regularly all waeres." And after referring to still other statutes:

"But in all these statutes, though they prohibit the thing, yet they do admit, that there may be such an interest lodged in a subject, not only in navigable rivers, but even in the ports of the sea itself contiguous to the shore, though below the low water mark, whereby a subject may not only have a liberty but also a right or propriety of the soil."

In the *De Jure Maris* in its earlier form published by Mr. Moore (p. 364), he said:

"1 — I conceive that *littus maris* may questionless belong and be parcel of a subject's manor, which is the point resolved in Sir H. Constable's case, 5 Rep. 107," etc.

"2 — The cases above *and likewise ordinary experience prove that it is most ordinarily parcel of the adjoining land.*"

In the later form of his treatise, that in which it has long been known, he has changed this to read:

"3rd — It may not only be parcel of a manor, but *de facto* it many times is so; and perchance it is parcel almost of all such manors as by prescription have royal fish or wrecks of the sea within their manor," (for wrecks and fish are left between high and low water by the receding of the tide) . . . "He therefore that hath wreck of the sea or royal fish by prescription *infra manerium*, it is a presumption that the shore is part of the manor, as otherwise he could not have them."

The case of the Sutton Marsh (Chap. VI. of *De Jure Maris*), in 12 Charles I. is of considerable interest because of the fine distinctions of pleading made to sustain the decision between *relictam* and *projectam*, and still more because of the distinction between the open sea and ports and rivers. He says:

instances given by him where the crown tried to assert its *prima facie* title, it met with vigorous opposition, and where a jury was permitted, as in the Shinberdge case near Bristol, the verdict and judgment was against the crown. Mr. Moore makes this significant statement: [1] "From the time that Digges first attempted to recover the marsh and fore shore from Hammond in 17 Elizabeth, A. D. 1574, until the present day, so far as I can discover, no jury has been found (with one exception) to give a verdict for the crown against evidence of user on the part of the subject. In the exception mentioned, on a second trial the verdict was against the crown." And his statement is fully justified by the reported cases.[2]

With this state of the common law in England, it is certainly most natural that the colonists should establish, not only in Connecticut, but in all other colonies, except in New York with its special history as a royal province, and except also perhaps in the Massachusetts Bay Colony in the immediate neighborhood of Boston, that law of the shore which has come to be known as the common law of this country upon the subject. It would have been an historical anomaly requiring some special explanation, if they had adopted any other.

While there are no historical facts to indicate that the law of Connecticut is at all different from the law of England as understood by the people in the early part of the seventeenth century, there are abundant historical facts to show that the law of New York is due to the same attempted usurpations of authority and property by the Stuart dynasty which led to their final overthrow

---

"But although a subject cannot acquire the interest of the narrow seas, yet he may by usage and prescription acquire an interest in so much of the sea as he may reasonably possess, viz. of a *districtus maris*, a place in the sea between such points, or a particular part contiguous to the shore, or of a port or creek or arm of the sea."

But not only *may* the subject have title to the soil, but it was usually held in private ownership. Thus in his *De Jure Maris* he says:

"That a subject having a port of the sea may have, and indeed in common experience and presumption hath, the very soil covered with water; for though it is true, the franchise of a port is a differing thing from the propriety of the soil of a port, and so the franchise of a port may be in a subject, and the propriety of the soil may be in the king or in some other, yet in ordinary usage and presumption they go together."

And he gives several instances.

[1] History and Law of the Foreshore, 616.

[2] See 1808, Rogers *v.* Allen, 1 Camp. N. P. 309 (Several Fishery); 1821, Chad *v.* Tilsed, 5 Moore (C. P.) 185; 1821, Blundell *v.* Catterall, 5 B. & A. 268; 1828, Lopez *v.* Andrews, 3 Man. & R. 329 N; 1848, Calmady *v.* Rowe, 6 C. B. 861; 1849, Beaufort *v.* Swansea, 3 Exch. Rep. 413; 1863, Atty.-Gen. *v.* Jones, 3 H. & C. 347; 1863, Malcomson *v.* O'Dea, 10 H. L. Cas. 591 (Fishery); 1879, Lord Advocate *v.* Blantyre, 4 App. Cas. 770.

by the Revolution of 1688. Settled by the Dutch, New York became an English Colony only by conquest in 1664, and it was granted by Charles II. as a royal province to his brother, the Duke of York, afterwards James II. Four commissioners, of whom Richard Nicol was chief and Samuel Maverick, of Boston, another, were appointed for all the Northern colonies, to settle sundry disputes between them, and also, clearly, to extend as far as possible the royal authority and control over them. Nicol usually remained in New York as its governor, and in that capacity was the personal representative of the Duke of York. One of Nicol's first acts was to promulgate "The Duke's Laws," one provision of which deserves repetition as showing that the spirit of government by prerogative and for the crown's personal benefit which characterized the Stuarts was not forgotten on this side of the Atlantic:

"To the end all former Purchases may be ascertained to the present possessor or right owner. They shall bring in their former Grants, and take out new patents for the same from the present Governor in the behalf of his Royal Highness the Duke of York. . . . Every purchaser in acknowledgment of the propriety of such lands belonging to his Royal Highness James, Duke of York, shall upon sealing of the Pattent pay unto the Government so much as they shall agree upon." [1]

About twenty years after Governor Nicol arrived in New York, Dongan was sent from England as the royal governor of that province, and it was he who granted in 1686 to the city of New York its first charter. This charter contains the grant to the city of the fee of all streets (whence is derived the law of New York in that respect), of open and unappropriated spaces, and the shore around the Island of Manhattan between high and low-water marks. This first charter was repeated verbatim in that of 1730, and can thus be found in the Appendix to Brook's History of New York City.[2] About the same time many similar grants were made by the royal governors to various other towns and municipalities,[3] and in 1730 the second charter to the city of New York was granted by Governor Montgomerie. This charter added to the

[1] 1 Colonial Laws of New York, 44.

[2] See p. 794, §§ 2–3, for streets and shore.

[3] Several reported cases involved such grants. See Rogers *v.* Jones, 1 Wend. (N. Y.) 237 (Oyster Bay); Trustees *v.* Strong, 60 N. Y. 56 (Brookhaven); Trustees *v.* Kirk, 68 N. Y. 459 (East Hampton); Robins *v.* Ackerly, 91 N. Y. 98 (Northport); Town of Southampton *v.* Mecox & Co., 116 N. Y. 1 (Southampton); see De Lancey *v.* Piepgras, 138 N. Y. 26, and compare People *v.* Van Rensselaer, 9 N. Y. 291.

prior grant of the shore a strip apparently from headland to headland and extending four hundred feet under tide water around the southern end of Manhattan Island.[1]

Next came the ratification in the fullest terms by the Colonial Legislature of 1732 of all grants to the city of New York under the great seal,[2] and finally the ratification by the people in the first State Constitution of 1777.[3] These royal grants to the city of New York thus confirmed, together with other similar grants from the royal governors, have established the law of the state, in the same way and perhaps with greater certainty than the grants in Boston and its vicinity have established the law of Massachusetts.

New York has always consistently acted upon the law thus determined. By virtue of the original grants and the purchase of a few still older titles to wharf property, the city of New York owns its entire water front, and has from time to time received other grants from the state. In front of Brooklyn and Staten Island the state has established two lines, the bulkhead line and the pier line, one outside the other. These lines are not, however, harbor lines in the sense the term is used in Connecticut and some other states, for any riparian owner must still obtain by purchase from the state title to the particular flats inside those lines before he can build upon them, and at the same time the state has full power to sell those flats to one who is not the owner of the upland. The federal government has also established lines which, because it cannot possibly own the soil, are true harbor lines. In the autumn of 1903 the city of New York, having obtained the necessary authority from the state, sought to extend their piers further into the North River, and Mr. Root, as Secretary of War, refused his permission. His successor, Judge Taft, has declined, we are informed, to reconsider this refusal. Thus, even the state's title is held subject to the police control of the federal government for the preservation of the public right of navigation.

The history of New Jersey law upon this subject is simple. The

---

[1] Brook's History, Appendix 819, § 38.

[2] Parker's Laws of New York, 1691 to 1751, p. 207.

[3] The New York Court of Appeals in Sage *v.* New York (154 N. Y. 61 at p. 82), after referring to the foregoing charters says of the act of 1732: "The effect of that act, standing alone upon a grant made in violation of Magna Charta, it is unnecessary to now consider; for it was confirmed by the Constitution of 1777, which was the result of all the legislative power that the people of the State of New York, untrammelled by any higher law, could exert." See also Trustees of Brookhaven *v.* Strong, 60 N. Y. 56, 67-70.

colonists introduced the same English law as did those of Connecticut and other colonies, and it remained the law of the state until the case of Stevens *v.* Paterson & Newark R. R. Co., in 1870, adopted what was then understood to be the law of New York, but without the excuse of any of the historical reasons or of the constitutional ratification of New York.

There are, however, certain historical facts connected with New Jersey of great interest. The limits of the present state were included in the grant of New York by Charles II. to his brother and became part of the royal province. The Duke of York almost immediately transferred the greater portion, at least, of New Jersey to Sir George Carteret, transferring to him all property rights and all rights and powers of sovereignty and government as fully as he himself had held them, and all these later became vested in certain proprietors. These proprietors in 1702 surrendered their powers of sovereignty and government by language evidently carefully chosen to make it plain that they intended to retain all rights of property, and afterward made certain grants of soil under water. If the Crown and the Duke of York owned the shores below high water and lands under water in such sense that they could separate them by sale and conveyance from their governmental powers — in other words, if they owned them as property and not merely as a trust for the public or in the technical sense of being subject to a police power of regulation — it is difficult to see why these later proprietors did not retain the property upon their surrender of their governmental powers. But when one of these grants came before the state courts, and later before the Supreme Court of the United States in Martin *v.* Waddell,[1] it was held void. The minority opinion of Thompson, J., shows how clearly the issue was understood in the decision of this case.[2]

Martin *v.* Waddell was decided in 1842. After the decision in Stevens *v.* Paterson & Newark R. R., in 1870, there came the case of Stockton *v.* Baltimore, etc., R. R. Co.,[3] an information by the Attorney-General of New Jersey praying an injunction against the defendant to prevent the erection of a bridge across the Arthur

[1] 16 Pet. (U. S.) 367.

[2] Compare with Martin *v.* Waddell the Portsmouth harbor case, where the Court and House of Lords declined to sustain a grant of the shore made by Charles I. Atty.-General *v.* Parmenter, 10 Price 378, 412.

[3] 32 Fed. Rep. 9.

Kill to Staten Island, "upon lands of the State situated on the shore and under the waters of the Kill," and it was contended that under the fifth amendment "the property of the State in lands under its navigable waters is private property and comes strictly within the constitutional provision,"[1] a claim in full accord with the view of absolute property in the state then and now held in New Jersey.

Mr. Justice Bradley of the Supreme Court gave the decision of the Circuit Court, and says on the same page: "The information rightly states that, prior to the Revolution, the shores and lands under water of navigable streams and waters of the province of New Jersey belonged to the King of Great Britain, as part of the *jura regalia* of the Crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the State as they were by the king, *in trust* for the public uses of navigation and fishery, and the erection thereon of wharves, piers, lighthouses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large," and the decision was that the state could not recover as for private property.

It is worth remembering, also, that the legislatures of both New York and New Jersey, while claiming and exercising the right to sell and convey lands under water, have always had a tender regard for the common impression everywhere prevailing that the riparian owner has some rights in front of his land. As a general rule in New York, the riparian owner has received the privilege of the first opportunity of acquiring such property from the state, and in New Jersey, while the State gives a preference to such owners on the shores of New York harbor for a limited time only, it makes such grants to riparian owners only throughout the rest of the state.[2]

Although it is probably impossible to trace the law of Massachusetts with certainty to any particular connection with the *prima facie* theory as understood by the English crown, yet the early grants by the General Court of the colony in exact conformity with that theory and the practice of the crown under it, lie at the foundation of its present law.

---

[1] P. 19.

[2] For New Jersey statutes see Fitzgerald *v.* Faunce, 46 N. J. Law 536, 592, etc.

The earliest of these grants, at least the earliest the evidence of which is accessible outside of Massachusetts, is that of the flats about Noddle's Island (East Boston), made in May, 1640: "It is declared that the flats round about Nodles Iland do belong to Nodles Iland to the ordinary lowe water marke."[1] This has always been regarded by the Massachusetts courts as a grant of the soil. Thus Gray, J., in Boston *v.* Richardson says:[2] "The fact, that after grants of property in the island to a private person in fee, and of the jurisdiction thereof to the town of Boston, an express order was made as to the flats around it, strongly implies that the title in those flats would otherwise have remained in the colony."[3]

Want of space forbids a detailed reference to many other early colonial grants of the shore in Massachusetts Bay,[4] but two others are of such importance as to require special notice. In 1647 was passed the famous Massachusetts colonial ordinance. It is now well understood that this was an addition to the prior ordinance of 1641, which was as follows: "Every inhabitant that is an house holder shall have free fishing and fowling in any great ponds and bayes, coves and rivers, so farr as the sea ebbes and flowes within the presincts of the towne where they dwell, unless the free men of the same towne or the General Court have otherwise appropriated them: provided that this shall not be extended to give leave to any man to come upon others propertie without there leave." This ordinance thus recognizes the fact that the General Court and some of the towns had previously made special grants or dispositions of the shore below high-water mark. It ends with a proviso, and the ordinance of 1647 is in terms an amendment. It is as follows: "The which clearly to determine . . . it is declared that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebbe above a hundred rods, and not more wheresoever it ebbs further: provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands." There is some evidence that in the early

[1] 1 Rec. of Mass. 291.

[2] 105 Mass. at foot of p. 359.

[3] See also Commonwealth *v.* Roxbury, 9 Gray (Mass.) at p. 495.

[4] See note at 9 Gray (Mass.) 503, where mention of many such grants will be found.

days it was understood that the riparian owner had the same right to wharf out without any grant of the soil as he had in Connecticut and Rhode Island;[1] and certainly when we carefully read these two ordinances of 1641 and 1647, they very clearly disclose two distinct views as to rights in the shores, with the victory for the time being resting with the riparian owner as against the public. In fact the ordinance of 1647 has also always been regarded by the Massachusetts courts as a grant of the soil by the General Court.[2]

In 1673–1674 came the famous barricado grant in Boston. It is said, in Brimmer *v.* Proprietors,[3] to have been made by the town of Boston, and in Commonwealth *v.* Alger,[4] to have been by the colonial government. But whatever authority made the grant, it was evidently made without regard to riparian ownership, and thus differed from most of the prior grants. It was also either below low-water mark or the cove then forming substantially the entire port of Boston[5] was above low-water mark. In any event it was certainly a grant of the soil for "200 feet inwards, towards the town, and so on the other side, of the same width, to the channel in the harbor,"[6] and becomes a strong instance of the assertion at an early day of the right of the government to make grants of soil under tide-water without regard to the ownership of the adjoining upland.

In addition to these and other early grants, there are said to have been many liberties to wharf out in Boston between 1640 and 1660. But these may be readily referred to the police power of regulating navigation, and are for this reason rejected as a basis for Massachusetts law.[7]

The state of Massachusetts has always continued to make similar grants of flats beyond the 100-rod line, and low-water

---

[1] See Gray, J., in Boston *v.* Richardson, 105 Mass. at p. 361; also 9 Gray (Mass.) pp. 514–515.

[2] See "The Case of 1649," 2 Mass. Rec. 284. For the ordinances of 1641 and 1647, see 7 Cush. (Mass.) pp. 67–68; 105 Mass. pp. 353–354. The statement so frequently repeated that the ordinance of 1647 was designed for the promotion of navigation by encouraging the building of wharves, would seem to be without the slightest foundation. See Concord Co. *v.* Robertson, 66 N. H. 1, 26–27.

[3] 5 Pick. (Mass.) at p. 130.

[4] 7 Cush. (Mass.) at p. 73.

[5] 7 Cush. (Mass.) at foot of p. 72 and middle of p. 73.

[6] 5 Pick. (Mass.) at p. 136.

[7] Gray, J., in Boston *v.* Richardson, 105 Mass. 351, 360, and 363.

mark, many times by special grant.[1] And there are said to have been hundreds of them prior to the act of 1869 declaring that thereafter they should be construed as revocable licenses.[2]

The Massachusetts court has fully recognized that the foregoing early grants of the soil under tide-water have established the law of Massachusetts, and made it different from that of other states, as, for example, Connecticut.[3] The rights of the riparian owner in Massachusetts Bay may be said for all practical purposes to have originated with the ordinance of 1647. By that ordinance he was granted an absolute title in fee to low water or the 100-rod line, and so it seems to have been considered until 1851, when Commonwealth *v.* Alger[4] was decided. The case was an indictment for extending a wharf beyond a harbor line laid between high and low-water mark. The court held that the riparian owner's title was still subject to the police power of the state for the promotion of navigation and that the defendant was guilty. As might naturally be expected, the decision was followed by the Statute of 1866 (chap. 149), which provided for harbor commissioners and gave them jurisdiction over all erections below high-water mark. The riparian owner in Massachusetts has therefore now no greater rights even to low water wherever the harbor commissioners have jurisdiction than similar owners in Connecticut.[5]

Although it is impossible to trace the colonial grants in and around Boston with any certainty to the same conception of the royal prerogative and its exercise as those in New York, yet it is certain that these early grants have established the law of Massachusetts as we find it to-day. As is well known, the settlement of Boston

---

[1] See Fitchburg R. R. Co. *v.* Boston & Maine R. R., 3 Cush. (Mass.) at pp. 71 and 87. Also Attorney-General *v.* Boston Wharf Co., 12 Gray (Mass.) at pp. 561–562, where several grants to the same proprietors are mentioned, all of which upon examination are found to be special and private grants.

[2] Bradford *v.* McQuester, 182 Mass. 80.

[3] See Commonwealth *v.* Alger, 7 Cush. (Mass) 53, 72 *et seq.*; Commonwealth *v.* Roxbury, 9 Gray (Mass.) 451, 478–499; Boston *v.* Richardson, 105 Mass. 351, 358–371.

It is interesting to compare the statements of Shaw, C. J., that the state's title is held in trust for the public in the first two of the above, with such later cases as Moore *v.* Sanford, 151 Mass. 285; Commonwealth *v.* Boston Terminal Co., 185 Mass. 281.

In the latter of these cases the court distinctly says that the limitation of a public trust is no longer recognized in Massachusetts.

[4] 7 Cush. (Mass.) 53.

[5] It is also an interesting query why the same reasoning which in Commonwealth *v.* Alger makes the title of the riparian owner subject to the police power, does not also reduce the title of the state to that of a mere police control.

was by colonists sent out by the home company located in London to which the royal grant had been made. This company was composed of educated men who administered its affairs with intelligence and sent out educated men as their representatives upon this side of the Atlantic, selecting and appointing Endicott and Winthrop as governors before the departure of the colonists from England. The charter was always construed as a grant not only of sovereignty, but also of actual title to all lands within its boundaries, and no title to any lands in the Massachusetts Bay could be or was acquired except by grant from the corporation either directly from the General Court or indirectly from the towns as municipalities, although there appears in very early days to have been some confusion between the Court and the towns in this respect. In fact, great care appears to have been taken that there should be no outstanding title not derived under the royal charter in some way. Thus grants were made confirming the titles of such men as Maverick, Blaxton, and Thompson, who had settled about Boston harbor before the arrival of Winthrop and his companions, to such lands as they had already occupied, and one of them, Walford, who would not recognize the new government, was banished.

Thus the titles to all lands in the Massachusetts Bay Colony were first public in a much more complete sense than were the lands in England when William the Conqueror and his immediate successors made their grants, and the foregoing early grants of shore and soil under water place a practical and contemporaneous construction upon the extent of the grants of upland intended, which could not be ignored when the Massachusetts courts were called upon to determine what was the law of the state, any more than the courts of New York could ignore the early grants made in that state. The "Proprietors" of Rhode Island and Connecticut were wholly unknown in Massachusetts Bay.

Maryland was also a proprietary province, but apparently there never were any early colonial grants of soil under water as in Massachusetts and New York. It is not, however, easy to determine just what is the law of Maryland. Its courts apparently declare the theoretical right of the state to make grants of such soil, but at the same time the riparian owners appear to have large and substantial rights of wharfing and filling, at least in Baltimore, by a colonial act of 1745, if not before.

Probably Connecticut and Rhode Island are the best examples

of systems of land titles not originally derived from the English crown. One of the most serious "heresies" of Roger Williams was that he denied the validity of the titles to land in the Bay Colony, asserting that valid titles could be obtained only from the Indian aborigines, and upon his banishment to Rhode Island he put his theory into practice by purchasing from the Indian chiefs the land now occupied by the city of Providence. The same thing is true of the Island of Rhode Island and appears to be also true of the Connecticut titles. In each of these instances the titles became vested in "Proprietors" who owned all land within the limits of their respective purchases in private ownership, and all original titles are by grants from these proprietors. Later on, it is true, evidently in response to a demand that these titles be theoretically ratified after the charters were obtained from the crown, acts were passed by the legislature of each colony, but these acts expressly ratified and confirmed the titles already held.[1] To say that in thus confirming to the proprietors titles already held, there was an exception of the shore and land under water in favor of the state, is to imply something which is certainly not expressed. In East Haven *v.* Hemingway[2] the claim went one step further. The action was brought by a grantee from the proprietors of sea shore under a grant made after the colonial confirmatory act, against a riparian owner holding under an early grant of the upland made many years before by the then proprietors. The argument was that as the title to the shore was in the crown, it could be derived only by grant from the crown, and was therefore first obtained by the colony by virtue of the colonial charter and first conveyed by the colony to the proprietors by act of the legislature. Therefore the proprietors then first obtained anything which they could grant, and they had first granted it to the plaintiff. This theory of necessity denied that the riparian owner holding under any earlier grant of upland took any interest below high-water mark. The court rejected this ingenious argument, and held that rights in the shore are adjuncts to the upland bordering upon it.

There is probably an entire absence of any early express grants to the shore or soil under water in both Connecticut and Rhode Island, either by the colonial or town authorities, — there are cer-

[1] R. I. Act of 1682; for the Connecticut law, see East Haven *v.* Hemingway, 7 Conn. 186.

[2] 7 Conn. 186.

tainly none in Rhode Island, — and there is therefore nothing in the history of land titles in these states upon which to base a claim that the *prima facie* theory ever became established as their law.

The two comparatively recent decisions of the United States Supreme Court upon this subject, The Illinois Central Railroad *v.* People of Illinois[1] and Shively *v.* Bowlby,[2] are said to be in conflict with each other.[3] But it can hardly be assumed that the court would permit both cases, decided within sixteen months, to stand as authorities if they supposed that there was any inconsistency between them. The explanation of the apparent conflict appears to be simple. Shively *v.* Bowlby was a writ of error to the Supreme Court of Oregon, and the court as usual in cases involving title to real property followed the law of Oregon as declared by its highest court.[4] The Illinois Railroad case on the other hand was an appeal in equity from the federal Circuit Court for the Northern District of Illinois, and the Supreme Court of Illinois had not apparently determined the law of the state at that time, so that the court was free to ascertain and apply the common law. The case involved the validity of a grant made by the state to the railroad in 1869 of a large tract under the waters of Lake Michigan in front of the city of Chicago, — the railroad maintaining its validity, and the state that there were certain constitutional defects in the passage of the act which gave it the power to revoke the grant, as it had attempted to do in 1873. The minority opinion, including Mr. Justice Gray of Massachusetts, who afterwards gave the opinion in Shively *v.* Bowlby, accepted the railroad's contention, resting for authority upon reported cases from several states adopting the New York view of the law of this subject. The majority opinion accepted neither contention, but held the grant of 1869 void as being beyond the power of the state legislature to make, saying that it could no more abdicate its trust over such property in which the whole people are interested than it could abdicate its powers of government. At the same time the court held both the city of Chicago and the railroad entitled to the riparian rights of wharfing and filling as an incident of their ownership in fee of certain lots bordering upon the lake.

The majority opinion, however, excepts from the legislature's lack of power to make grants of soil under water not only parcels

---

[1] 146 U. S. 387. [2] 152 U. S. 1.

[3] In Cobb *v.* Lincoln Park Commissioners, 202 Ill. 427.

[4] See 152 U. S. at p. 57.

for the improvement of navigation, but also parcels which can be disposed of without impairment of what remains, saying that the grant of such parcels is a very different thing from the abdication of the general control over lands under an entire harbor or bay. Exactly what did the court mean by these statements? Respecting grants made strictly for the aid of navigation, as for lighthouses and jetties, there can be no question. But apparently the court meant to go further. It has been customary from the earliest days of their existence in probably all our states for the legislature to grant rights to construct bridges and highways and, later, railroads across the public waters. But it does not appear to be a legitimate inference from such grants that the state necessarily has a private commercial title to the soil under water. It would rather seem that the grants were merely declarations that soil already subject to public rights of navigation could be devoted to other public purposes without detriment to the public, and it would further seem that they should be made subject to compensation for private riparian rights only where it becomes necessary for the grantee to take such property rights. To go beyond this and say that the state has power to make such grants because it is the owner in a private capacity of the soil, is to draw a distinction between small and large parcels which it would be difficult to sustain upon any principle. If we adopt the law of New York and New Jersey, the state legislature may make such grants, small or large, with very little if any regard to the riparian owner, for such owner has substantially no property rights. If, on the other hand, we adopt the Connecticut doctrine, the legislature can grant such parcels, whether large or small, only for public purposes and subject to constitutional provisions for compensation to the riparian owner for the taking of his property. Because the majority opinion in the Illinois railroad case has fully sustained riparian rights of wharfing and filling where they properly exist, it would seem that the court did not mean to assert that small parcels could be granted without reference to those rights any more than large parcels, and that the statements respecting the granting of small parcels should be construed as assertions of what had at times in fact been granted, rather than as statements modifying or limiting the principles of law announced.[1]

[1] In the following cases small or comparatively small grants were held to be void upon the same principle as enunciated in the Illinois Central Railroad case, *viz.*: Priewe *v.* Wisconsin, etc., Society, 93 Wis. 534; Union Depot Co. *v.* Brunswick, 31

A suggestion had been advanced to sustain the power of our state legislatures to make grants of soil under water which deserves a brief consideration. The court in Stevens *v.* Paterson & Newark R. R. Co. attempted to sustain their decision upon the ground that the state legislature had all the powers of the British Parliament, and that though the crown might not have had the right to grant soil under tide water, Parliament and consequently the state legislature in the exercise of their more ample powers could do so. The same thought has been repeated at times in other cases and in at least one text-book.[1] The court does not, however, cite any instance in which Parliament ever made such a grant, nor does it show whence it could derive any such power. Aside from the fact that Magna Charta and the statute Quia Emptores appear to have had much to do with the law upon this subject, and even Parliament with all its powers would not at any time within several centuries at least have ventured to act contrary to their mandates, it is impossible, we think, to find any basis for imputing to Parliament any greater power to make private grants of soil under navigable water than the crown possessed. If such soil is the proper subject of ownership in the sense that it can be sold and disposed of as private property, its owner according to all legal precedents should have that power of disposal, whether that owner be the crown or the government represented by Parliament or the state legislature. If on the other hand the so-called title is a technical one held in substance for the general good of the people, the legislature should have no greater power than any other trustee of the same trusts.

As a matter of fact, when this theory of the law in this country is examined historically, there is not the slightest ground for deriving it from any power of Parliament. It comes from New York and Massachusetts Bay, and in the former is derived directly from grants made by the early colonial governors as the personal repre-

Minn. 297; Norfolk City *v.* Cooke, 27 Gratt. (Va.) 438. And see also Rossmiller *v.* State, 114 Wis. 169.

[1] The matter for this article was collected and much of it put together before the writer saw the work of Mr. Farnham on Water and Water Rights. While Mr. Farnham fully and frankly states that the *prima facie* theory was new in England at the time of the founding of our American colonies, he would seem to think that the new theory was transferred to this country much more universally than appears to have been the case. But it would also seem to be very clear that he has not traced out and comprehended how the early historical grants in Massachusetts Bay and New York have determined the law of those colonies contrary to that of most, if not all, of the other original states.

sentatives of the English crown, and in the latter from a very thorough system of land titles which were from the very outset theoretically and practically traced to the same source. The only difference between the two colonies is that in one there were express grants by the crown's representative of parcels of shore and soil under water, while in the other the colonists at once construed the broad grant of the crown as enabling them to make grants of the upland and of the shore separately, but with both directly traced back to the common source, — the crown's grant by the charter. The historical reason why the law of Connecticut differs from that of Massachusetts is that there was no grant from the crown in the first instance, and when such a grant was later obtained, instead of placing a contemporaneous construction upon it by making separate grants of the shore, the rights of the riparian owner to wharf and fill out were still regarded as incidents of his prior ownership of the upland, in accordance with the customary ownership at the time among the people of England as distinguished from the claims of the crown and its officers under the *prima facie* theory.

If this article succeeds in calling the attention of the legal profession not only to the existence of the two distinct theories of shore rights and titles existing in this country, but also to the historical reasons why they exist, and some of the incidents necessarily flowing from the existence of each, it will have accomplished every end sought.

William R. Tillinghast.

PROVIDENCE, R. I.